

1 **WO**

2  
3  
4  
5  
6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 William Martin,

10 Plaintiff,

11 v.

12 Weed Incorporated, et al.,

13 Defendants.  
14

No. CV-18-00027-TUC-RM

**ORDER**

15 Pending before the Court are Cross-Motions for Summary Judgment, both of which  
16 are fully briefed. (Docs. 56, 75, 80, 82.) The Court heard oral argument on October 15,  
17 2019, and took the matter under advisement. (Doc. 104.) For the reasons that follow, both  
18 Motions will be granted in part and denied in part.

19 **I. Factual and Procedural History**

20 On January 19, 2018, Plaintiff William Martin filed this action against Defendant  
21 Weed, Incorporated (“WEED”). (Doc. 1.) Plaintiff alleged that he entered into a contract  
22 with WEED, which WEED breached by failing to issue Plaintiff 700,000 shares of WEED  
23 stock. (*Id.* at 2–3.)<sup>1</sup> Based on the foregoing allegations, Plaintiff brought four claims: two  
24 for breach of contract, one for breach of the covenant of good faith and fair dealing, and  
25 one for conversion. (*Id.* at 3–5.)

26 On March 27, 2018, Plaintiff filed the operative First Amended Complaint, alleging  
27 the same four claims against WEED. (Doc. 29 at 4–7.) In addition, Plaintiff added several

28 <sup>1</sup> Record citations refer to the page numbers electronically generated by the Court’s filing system, not to the cited documents’ original page numbers.

1 defendants: Glenn Martin, President and CEO of WEED; Nicole Breen, Secretary and  
2 Treasurer of WEED; Ryan Breen, Vice President and Social Media Officer of WEED; and  
3 GEM Management Group, LLC. (*Id.* at 2.) Plaintiff brings a fifth claim against all  
4 Defendants for violation of Ariz. Rev. Stat. § 44-1004, alleging that WEED transferred  
5 stock shares to the other Defendants for the purpose of defrauding Plaintiff as a creditor.  
6 (*Id.* at 7–8.)<sup>2</sup>

7 On May 31, 2018, WEED filed its operative Second Amended Counterclaim. (Doc.  
8 50.) WEED alleges two counterclaims against Plaintiff: one for fraudulent  
9 misrepresentation and concealment, and one for breach of contract. (*Id.* at 6–9.) The  
10 counterclaim for breach of contract rests on the allegation that Plaintiff did not perform  
11 any services under the parties’ contract. (*Id.* at 8–9.) The fraud counterclaim arises from  
12 WEED’s decision to hire Michael Ryan, a longtime friend of Plaintiff. (*See id.* at 6–7.)  
13 WEED alleges that it hired Ryan based on the recommendation of Plaintiff, and that  
14 Plaintiff made such recommendation without disclosing that he was indebted to Ryan and  
15 intended for WEED to satisfy that debt by issuing stock shares to Ryan. (*Id.* at 7–8.)  
16 WEED further alleges that Plaintiff told Ryan that contractual performance would not be  
17 required, and that Ryan indeed did not perform. (*Id.* at 8.)

18 Both Plaintiff and WEED filed Motions to Dismiss. (Docs. 13, 20.) The Court  
19 granted WEED’s Motion to Dismiss, finding Plaintiff’s claims for conversion and breach  
20 of the covenant of good faith and fair dealing barred by the statute of limitations. (Doc. 49  
21 at 13–14.) The Court partially granted Plaintiff’s Motion to Dismiss, finding that WEED  
22 had stated a counterclaim for fraud based on misrepresentation and/or concealment, but not  
23 fraudulent nondisclosure. (*Id.* at 14.)

24 Thus, Plaintiff has three claims pending: two for breach of contract, and one for  
25 fraudulent transfer in violation of Ariz. Rev. Stat. § 44-1004. WEED has two  
26 counterclaims pending: one for fraud based on misrepresentation and/or concealment, and

---

27  
28 <sup>2</sup> Plaintiff includes a sixth claim for “injunctive relief” against WEED. (Doc.  
29 at 7.) This “claim” is not an independent legal ground for obtaining relief but is itself a  
form of relief. It is not discussed in this Order.

1 one for breach of contract. All claims are challenged on summary judgment.

## 2 **II. Legal Standard**

3 Summary judgment is proper “if the movant shows that there is no genuine dispute  
4 as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R.  
5 Civ. P. 56(a). A fact is material if it “might affect the outcome of the suit under the  
6 governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual  
7 dispute is genuine if the evidence is such that a reasonable trier of fact could resolve the  
8 dispute in favor of the nonmoving party. *Id.* In evaluating a motion for summary judgment,  
9 the court must “draw all reasonable inferences from the evidence” in favor of the non-  
10 movant. *O’Connor v. Boeing N. Am., Inc.*, 311 F.3d 1139, 1150 (9th Cir. 2002). A  
11 reasonable inference is one which is supported by “significant probative evidence” rather  
12 than “threadbare conclusory statements.” *Barnes v. Arden Mayfair, Inc.*, 759 F.2d 676,  
13 680–81 (9th Cir. 1985) (internal quotation marks omitted). If “the evidence yields  
14 conflicting inferences [regarding material facts], summary judgment is improper, and the  
15 action must proceed to trial.” *O’Connor*, 311 F.3d at 1150.

16 The party moving for summary judgment bears the initial burden of identifying  
17 those portions of the record, together with affidavits, if any, that it believes demonstrate  
18 the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323  
19 (1986). If the movant meets this burden, the burden shifts to the nonmovant to “come  
20 forward with specific facts showing that there is a genuine issue for trial.” *Matsushita*  
21 *Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal quotation marks  
22 and emphasis omitted); *see also* Fed. R. Civ. P. 56(c)(1).

## 23 **III. Contract Claims**

### 24 **A. Background<sup>3</sup>**

25 In October 2014, Plaintiff and WEED entered into a Consulting Agreement for  
26 Plaintiff to provide consulting services to WEED. (DSOF ¶ 5.) The Consulting Agreement

---

27 <sup>3</sup> “DSOF” refers to Defendants’ Statement of Facts. (Doc. 57.) “PSOF” refers  
28 to Plaintiff’s Statement of Facts. (Doc. 76.) All quotations are provided without  
corrections and without signaling errors with “[sic].”

1 provides that Plaintiff would be compensated with 1.2 million shares of WEED stock, to  
2 be issued in two installments. (DSOF ¶ 6; Doc. 76-1 at 2, 9.) WEED issued the first  
3 installment of 500,000 shares to Plaintiff. (DSOF ¶ 6; Doc. 81-4 at 8.) Per the Consulting  
4 Agreement, the second installment of 700,000 shares would “become, due and payable . .  
5 . within 30 days on April 1st. 2015 . . . .” (Doc. 76-1 at 9.)

6 On April 1, 2015, Plaintiff exchanged emails with Glenn Martin, who signed the  
7 Consulting Agreement on behalf of WEED. (Doc. 57-2 at 74–77.) In the first email,  
8 Plaintiff sets forth a proposed “50/50 joint venture” and concludes: “I’m happy to work  
9 with you, but not for you.” (*Id.* at 77.) The response email from Glenn Martin states,  
10 among other things:

11 So far now we will go our separate ways in business. We will always stay  
12 friends I PRAY !! You said we were even with the 500k shares and thats  
13 good. If I had to put out another 700k for only getting 1/2 of \$27,500 would  
14 of been upsetting.

15 (*Id.* at 74.) WEED never issued Plaintiff the second installment of 700,000 shares. (*See*  
16 DSOF ¶ 8.)

17 Plaintiff brings two claims for breach of contract based on WEED’s refusal to issue  
18 the remaining 700,000 shares. WEED denies these claims, contending that the Consulting  
19 Agreement was terminated before the shares became payable. WEED brings a  
20 counterclaim for breach of contract, asserting that Plaintiff breached by never performing  
21 any consulting services. Plaintiff denies this claim, arguing that the evidence shows both  
22 that he performed and that WEED is the breaching party.

### 23 **B. The Consulting Agreement**

24 The Consulting Agreement is governed by Arizona law. (Doc. 76-1 at 6.) Under  
25 Arizona law, contracts are interpreted so as to “ascertain and enforce the parties’ intent.”  
26 *ELM Ret. Ctr., LP v. Callaway*, 246 P.3d 938, 941 (Ariz. App. 2010). To determine what  
27 the parties intended, the Court must “first consider the plain meaning of the words in the  
28 context of the contract as a whole.” *Grosvenor Holdings, L.C. v. Figueroa*, 218 P.3d 1045,  
1050 (Ariz. App. 2009). If the contract is unambiguous, “its interpretation is a question of  
law for the court.” *Callaway*, 246 P.3d at 942.

1 The Compensation Provision provides in relevant part:

2 The balance of 700,000 (seven hundred thousand) shares due on contract  
3 shall become, due and payable as described above, within 30 days on April  
1st. 2015 and shall be issued within 30 days of its due date.

4 (Doc. 76-1 at 9.) The parties agree on the meaning of this provision: On April 1, 2015, the  
5 700,000 shares would become due to Plaintiff as compensation, and WEED would be  
6 required to issue the shares to Plaintiff no later than May 1, 2015 (thirty days after the  
7 shares became due). (Doc. 29, ¶ 10; Doc. 81-3 at 28.)<sup>4</sup>

8 Therefore, if the Consulting Agreement was not terminated before April 1, 2015,  
9 WEED breached by not issuing the shares to Plaintiff. The Consulting Agreement's  
10 termination provision states:

11 The Agreement will terminate on September 30th 2015. The Company or  
12 the Consultant may terminate this Agreement at any earlier time, with or  
13 without cause, in which event the Company shall only be responsible for that  
14 portion of the Compensation due and payable up to and including the date of  
15 such termination by the Consultant. Both parties, if able to terminate this  
Agreement in accordance with this Section, may effectuate the termination  
by written notice to the other party.

16 (Doc. 76-1 at 5.)

17 Plaintiff argues that, under the Consulting Agreement's plain language, termination  
18 releases the Company from its duty to compensate the Consultant *only if* the termination is  
19 "by the Consultant." In other words, if termination is "by the Company," the Company  
20 still must pay all compensation. WEED responds that it would prevail even were Plaintiff  
21 correct, because the evidence shows the parties mutually terminated the Consulting  
22 Agreement before April 1, 2015. In reply, Plaintiff argues that "mutual termination" has  
23 the same effect as termination "by the Company" because it is "by both parties," not "by

24  
25 <sup>4</sup> Plaintiff alleged in his Verified Complaint that the shares were "to be issued  
26 by May 31, 2015." (See Doc. 1, ¶ 7.) His position changed in the unverified First Amended  
27 Complaint, where he alleges that the shares were "to be issued within 30 days of its due  
28 date of April 1, 2015." (Doc. 29, ¶ 10.) Even if superseded, a verified pleading is "akin to  
a sworn declaration," and thus negative consequences may flow to a party who contradicts  
his own inoperative, verified pleading. *PAE Gov't Servs., Inc. v. MPRI, Inc.*, 514 F.3d 856,  
859 n.2 (9th Cir. 2007). Here, nothing indicates that the amended allegation was made in  
bad faith, as both parties agree that it sets forth the correct interpretation. (See Doc. 44, ¶  
10.)

1 the Consultant.”

2 The Court partially agrees with Plaintiff. The second sentence must be interpreted  
3 to mean that *only* termination “by the Consultant” absolves the Company of its duty to  
4 compensate the Consultant. WEED offers no alternative interpretation that gives meaning  
5 to “by the Consultant,” nor is the Court able to discern one. *See First Credit Union v.*  
6 *Courtney*, 309 P.3d 929, 934–35 (Ariz. App. 2013) (stating that contracts must be  
7 construed so that no portion is rendered meaningless).<sup>5</sup> However, the Court disagrees that  
8 termination “by the Consultant” does not include mutual termination. By definition,  
9 mutual termination would be both “by the Company” *and* “by the Consultant.” In the case  
10 of either unilateral or mutual termination, the Consultant would be deciding to stop  
11 performance and walk away from the contract. It would be absurd if the Consultant  
12 forfeited compensation in one situation but not the other. *See Roe v. Austin*, 433 P.3d 569,  
13 575 (Ariz. App. 2018) (“[C]ourts must avoid an interpretation of a contract that leads to an  
14 absurd result.”).

15 Moving to the third sentence, Plaintiff argues that termination was valid only if done  
16 in writing. The Court agrees with Plaintiff’s interpretation. The use of “may” does not  
17 mean that a party “may” choose to terminate through written notice or “may” choose to  
18 terminate through some other means (e.g., orally). Adopting that interpretation would  
19 render the entire sentence superfluous. *See Courtney*, 309 P.3d at 934–35. Rather, the  
20 sentence means that a party “may” choose to terminate through written notice or “may”  
21 choose to not terminate. *See Mullenaux v. Graham County*, 82 P.3d 362, 366 (Ariz. App.  
22 2004) (holding that use of “may” in statutory grievance procedure means an employee

---

23  
24 <sup>5</sup> During oral argument, defense counsel stated that it “doesn’t make sense”  
25 that the Company should have to pay all compensation after it unilaterally terminates. But  
26 there is logic underlying this provision. The Consultant is agreeing to be available for a  
27 predetermined length of time and may pass over other opportunities to meet that obligation;  
28 if the Company unilaterally terminates the contract, then, it makes sense that the  
Consultant, who was ready to fulfill his obligations, should be compensated. On the other  
hand, if the Consultant desires to terminate the contract, it makes sense that he should  
receive no further compensation. Furthermore, the covenant of good faith and fair dealing,  
which is implied in every contract, would preclude the Consultant from engaging in bad-  
faith behavior designed to cause the Company to unilaterally terminate the contract. *See*  
*Bike Fashion Corp. v. Kramer*, 46 P.3d 431, 434 (Ariz. App. 2002).

1 “may” comply with the grievance procedure or “may” abandon the grievance); 11 *Williston*  
2 *on Contracts* § 30.10 (4th ed. 2018) (stating that “whether a permissive or mandatory  
3 construction applies to [‘may’] ultimately depends on the apparent intention of the parties  
4 as gathered from its context, considering the whole instrument in which the word was  
5 used”).

6 The Court’s interpretation may be summarized as follows: On April 1, 2015,  
7 Plaintiff would become entitled to the 700,000 shares as compensation. Once the 700,000  
8 shares became due as compensation, WEED would be required to issue the shares to  
9 Plaintiff by May 1, 2015. Either party could terminate the Consulting Agreement at any  
10 time, but only by sending written notice to the other party. Termination by Plaintiff (either  
11 unilateral or mutual) would relieve WEED of its obligation to pay compensation that had  
12 not yet become due. Unilateral termination by WEED would not lift that obligation; that  
13 is, WEED would still owe Plaintiff whatever compensation became due after the  
14 termination date.

### 15 C. Discussion

#### 16 1. Plaintiff’s Claims

17 WEED argues that it is entitled to summary judgment on Plaintiff’s breach-of-  
18 contract claims because the Consulting Agreement was mutually terminated in March  
19 2015, before the 700,000 shares became due. WEED points to the April 1, 2015 emails  
20 between Plaintiff and Glenn Martin as evidence that termination occurred at some point in  
21 March 2015. In response, Plaintiff asserts that he, not WEED, is entitled to summary  
22 judgment. He disputes that termination occurred in March 2015, pointing out that there is  
23 no written notice of termination dated prior to April 1. Moreover, Plaintiff argues, he is  
24 entitled to the shares because he did not terminate the Consulting Agreement, WEED did.<sup>6</sup>

---

25 <sup>6</sup> In its motion, WEED states several times that “WEED” terminated the  
26 Consulting Agreement. (Doc. 56 at 2, 4, 5.) As explained above, unilateral termination by  
27 WEED would not absolve it of its duty to issue the 700,000 shares. It appears, however,  
28 that WEED’s statements, though careless, are not admissions. WEED’s statement of facts  
says merely that “the Consulting Agreement was terminated before Plaintiff was entitled  
to the additional 700,000 shares.” (DSOF ¶ 8.) The evidence supporting that statement  
includes Glenn Martin’s affidavit, which similarly states that “the Consulting Agreement  
was terminated.” (Doc. 57-1, ¶ 17.) Additionally, in responding to Plaintiff’s request for

1 The parties' requests for summary judgment will be denied. To be sure, the  
2 Consulting Agreement provides a specific method for early termination: "written notice to  
3 the other party." The record establishes that the April 1, 2015 emails are the earliest  
4 possible "written notice" of termination. April 1, 2015 is also the date on which the  
5 700,000 shares became due as compensation. Because the Consulting Agreement's plain  
6 language required WEED to pay all compensation due "up to and including the date of . .  
7 . termination," if the writing requirement is valid, WEED breached by not issuing the shares  
8 to Plaintiff. (Doc. 76-1 at 5.)

9 However, there is a genuine dispute whether the parties waived the writing  
10 requirement through their conduct. *See Russo v. Barger*, 366 P.3d 577, 580 (Ariz. App.  
11 2016) (stating the general rule that "one party may waive any provision of a contract made  
12 for his benefit"). Glenn Martin testified that the parties orally agreed to terminate the  
13 Consulting Agreement prior to April 1, 2015. (Doc. 81-3 at 28–29.) He followed up with  
14 an email to Plaintiff on April 1, stating: "You said we were even with the 500k shares and  
15 that's good. If I had to put out another 700k for only getting 1/2 of \$27,500 would have  
16 been upsetting." (Doc. 57-2 at 74.) This language suggests the existence of a prior  
17 understanding that Plaintiff would receive no more shares; significantly, Plaintiff did not  
18 object to this language in his response a few days later. (*Id.*) In fact, it appears from the  
19 record that Plaintiff waited more than two years to raise an objection. (*See id.* at 87  
20 (demand letter to Glenn Martin dated December 29, 2017).)

21 Under these circumstances, a reasonable jury could find that the parties waived the  
22 writing requirement and mutually terminated the Consulting Agreement prior to April 1,  
23 2015. *See Thermo-Kinetic Corp. v. Allen*, 493 P.2d 508, 512 (Ariz. App. 1972) (stating  
24 that "the conduct of the parties may constitute a waiver of the requirement of written notice  
25 of termination"); *Gruber v. Castleberry*, 533 P.2d 82, 83–84 (Ariz. App. 1975) (stating that  
26 where a "lease stipulates written notice, a waiver of the requirement may be implied from  
27 the conduct of the parties" and that "[c]learly, waiver is a question of fact to be determined

28 

---

a preliminary injunction, WEED submitted an earlier affidavit from Glenn Martin stating  
that "the parties terminated the Consulting Agreement by agreement." (Doc. 9-1, ¶ 14.)

1 according to the intention of the parties as disclosed by the facts”); *Chaney Bldg. Co. v.*  
2 *Sunnyside Sch. Dist. No. 12*, 709 P.2d 904, 907 (Ariz. App. 1985) (stating that “waiver  
3 may be inferred from conduct and is, therefore, a question of fact to be determined by the  
4 trier of fact”). Therefore, summary judgment will be denied.

## 5 **2. WEED’s Counterclaim**

6 WEED alleges in its counterclaim for breach of contract that Plaintiff “failed to  
7 provide any consulting services to WEED.” (Doc. 50 at 9.) Plaintiff seeks summary  
8 judgment, arguing that the evidence shows he provided at least some consulting services,  
9 both before and after April 1, 2015. In response, WEED shifts its position, arguing that  
10 Plaintiff breached by not “perform[ing] consulting services for the full term of the  
11 contract.” (Doc. 80 at 15.)

12 Summary judgment will be granted. WEED’s counterclaim, as pleaded, alleges that  
13 Plaintiff performed no consulting services *whatsoever*. Thus, WEED’s claim necessarily  
14 fails if Plaintiff performed at least some consulting services. WEED expressly admits this  
15 to be the case: “Plaintiff provided some consulting services to WEED, Inc. before the  
16 Consulting Agreement was terminated.” (Doc. 81 at 3.) WEED did not plead that Plaintiff  
17 breached by failing to perform for the entire contract period. Therefore, WEED may not  
18 rely on that theory to save its counterclaim. *See Wasco Prods., Inc. v. Southwall Techs.,*  
19 *Inc.*, 435 F.3d 989, 992 (9th Cir. 2006) (“Simply put, summary judgment is not a procedural  
20 second chance to flesh out inadequate pleadings.” (quoting *Fleming v. Lind-Waldock &*  
21 *Co.*, 922 F.2d 20, 24 (1st Cir. 1990))).

## 22 **IV. Fraudulent Transfer**

23 Plaintiff brings a claim under Ariz. Rev. Stat. § 44-1004, alleging that WEED  
24 transferred shares of stock to Nicole and Ryan Breen with intent to hinder, delay, or defraud  
25 Plaintiff as a creditor of WEED. WEED asserts that it is entitled to summary judgment.

### 26 **A. Background**

27 The Consulting Agreement does not contain any anti-dilution provision. (DSOF ¶  
28 14.) WEED’s prospectus states the following as a “risk factor” of investment: “We will

1 need additional capital in the near future. Any equity financing will result in dilution to  
2 our then-existing stockholders.” (DSOF ¶ 15.)

3 Nicole Breen serves as Secretary and Treasurer of WEED and is periodically  
4 compensated with WEED stock for her services. (DSOF ¶¶ 17–18, 21.) As of December  
5 31, 2016, Nicole Breen owned 19,947,520 shares of WEED stock. (DSOF ¶ 20.) Ryan  
6 Breen serves as Vice President and Social Media Officer of WEED and is periodically  
7 compensated with WEED stock for his services. (DSOF ¶¶ 22–23, 26.) As of June 30,  
8 2017, Ryan Breen owned 5,047,766 shares of WEED stock. (DSOF ¶ 25.)<sup>7</sup> All  
9 compensation was approved by WEED’s Board of Directors and disclosed in WEED’s S-  
10 1 Registration. (DSOF ¶¶ 19, 24.)

### 11 **B. Discussion**

12 Summary judgment will be granted in favor of WEED. Under Ariz. Rev. Stat. §  
13 44-1004(A), a transfer is fraudulent if done (1) “[w]ith actual intent to hinder, delay or  
14 defraud any creditor” or (2) “[w]ithout receiving a reasonably equivalent value in exchange  
15 for the transfer or obligation,” and the debtor either engages in business without sufficient  
16 assets or incurs debts beyond his ability to pay. WEED presents evidence that both Nicole  
17 and Ryan Breen were employed by WEED, that they (like Plaintiff) were compensated for  
18 their services with WEED stock, and that such compensation was approved by WEED’s  
19 directors and disclosed in its S-1 Registration. (*See* Doc. 57-1 at 5–6.) Furthermore,  
20 investors were warned that dilution was forthcoming, and Glenn Martin denies that the  
21 shares were issued with intent to defraud Plaintiff. (*Id.* at 6.) This evidence is sufficient  
22 to shift the burden to Plaintiff to show a triable issue. *Matsushita Elec. Indus. Co.*, 475  
23 U.S. at 587.

24 Plaintiff has not carried his burden to show a genuine dispute that WEED issued the  
25 shares with intent to hinder, delay, or defraud its creditors. *See Mendiola-Martinez v.*

---

26 <sup>7</sup> In his statement of facts, Plaintiff “admits” that Nicole and Ryan Breen  
27 “received stock *supposedly* in exchange for [their] services.” (PSOF ¶¶ 18, 23 (emphasis  
28 added).) If Plaintiff disputed these facts, he should have cited to a “specific admissible  
portion of the record supporting” the dispute. LRCiv 56.1(b). He did not do so. These  
facts are deemed admitted without qualification.

1 *Arpaio*, 836 F.3d 1239, 1247 (9th Cir. 2016) (stating that summary judgment is appropriate  
2 where plaintiff fails to support an element of her claims with evidence). In opposing  
3 summary judgment, Plaintiff relies solely on his deposition. (PSOF ¶ 29.) He cites to a  
4 single, brief exchange:

5 Q: Tell me every fact upon which you rely for your allegation that when the  
6 shares were issued, as alleged by you in the first amended complaint, it was  
7 done with the intent to hinder, delay or defraud you.

8 A: Aside from the fact of dilution, I can't say anything specific.

9 (Doc. 81-4 at 35.) This speculative testimony does not show a dispute of material fact.  
10 Plaintiff acknowledged that the issuance of shares will always result in the dilution of all  
11 preexisting shareholders' ownership interests, and he was unable to explain why the  
12 issuance of shares in this case shows intent to hinder, delay, or defraud. (*Id.* at 34–35.) In  
13 short, Plaintiff offers only speculation that WEED had the requisite intent. No reasonable  
14 jury could find from such testimony that WEED issued shares to Nicole and Ryan Breen  
15 with intent to hinder, delay, or defraud Plaintiff or any other creditor. *Gerow v. Covill*, 960  
16 P.2d 55, 63 (Ariz. App. 1998) (stating that intent under § 44-1004(A)(1) “may be shown  
17 by direct proof or by circumstantial evidence from which actual intent may be *reasonably*  
18 inferred” (emphasis added) (citation omitted)); *see Echols v. Beauty Built Homes, Inc.*, 647  
19 P.2d 629, 631 (Ariz. 1982) (“Fraud may never be established by doubtful, vague,  
20 speculative, or inconclusive evidence.” (citations omitted)).

21 Next, Plaintiff has failed to identify any evidence that WEED did not receive  
22 reasonably equivalent value for the shares. His briefing is devoid of any argument that  
23 WEED did not receive reasonably equivalent value, and he has acknowledged that the  
24 Breens received stock in exchange for their services. Therefore, summary judgment will  
25 also be granted on this portion of Plaintiff's claim.

## 26 **V. Fraudulent Misrepresentation and Concealment**

27 WEED brings a counterclaim for fraudulent misrepresentation and concealment in  
28 connection with Plaintiff's alleged recommendation to hire Michael Ryan as a consultant.  
Plaintiff seeks summary judgment.

1           **A. Background**

2           WEED's claim of fraudulent misrepresentation and concealment are based on the  
3 following allegations: Plaintiff represented that Ryan was interested in becoming a  
4 consultant for WEED and had the skills and abilities to provide valuable consulting  
5 services to WEED. (Doc. 50 at 6.) Plaintiff encouraged and persuaded WEED to hire  
6 Ryan as a consultant, which WEED did. (*Id.* at 6–7.) At the time Plaintiff made the  
7 recommendation, WEED did not know that Plaintiff was indebted to Ryan, that Plaintiff  
8 had told Ryan that the shares issued by WEED as compensation would satisfy Plaintiff's  
9 debt, that Plaintiff had told Ryan that no consulting services would need to be performed,  
10 and that Ryan had no intention of performing consulting services. (*Id.* at 7–8.) Ryan  
11 received WEED stock as compensation but performed no consulting services. (*Id.* at 8.)

12           **B. Discussion**

13           Summary judgment will be granted in favor of Plaintiff. There are clear disputes  
14 concerning whether Plaintiff encouraged WEED to hire Ryan and whether Ryan performed  
15 any consulting services once hired. Those disputes are immaterial, however, because  
16 WEED points to no admissible evidence from which a reasonable jury could infer that  
17 Plaintiff intended to deceive Glenn Martin or WEED. *See McAlister v. Citibank (Ariz.)*,  
18 829 P.2d 1253, 1260 (Ariz. App. 1992) (“The party alleging fraud bears the burden of  
19 establishing the intent to deceive.” (citation omitted)).

20           WEED relies on the following facts to establish that the recommendation was made  
21 with fraudulent intent: (1) Plaintiff told Chris Richardson (a) that Plaintiff was indebted to  
22 Ryan, and (b) that Plaintiff told Ryan that he would receive stock shares from WEED to  
23 satisfy the debt, and that Ryan need not perform any consulting services; and (2) Ryan  
24 performed no consulting services. (*See* Doc. 80 at 14.) Glenn Martin learned from  
25 Richardson that Plaintiff had made the foregoing statements. (*See* Doc. 81 ¶¶ 30, 34.)

26           WEED correctly points out that Plaintiff's alleged statements to Ryan and  
27 Richardson are non-hearsay party-opponent statements. Fed. R. Evid. 801(d)(2).  
28 However, Richardson's statements to Glenn Martin are inadmissible hearsay because they

1 are out-of-court statements offered for the truth of the matters asserted. Fed. R. Evid.  
2 801(c). Thus, unless WEED can establish an exception to the hearsay rule, Richardson's  
3 statements—and thus Plaintiff's statements—are inadmissible and may not be considered.  
4 *See Rosa v. Taser Int'l, Inc.*, 684 F.3d 941, 948 (9th Cir. 2012) (stating that federal courts  
5 may consider only facts that would be admissible in evidence when ruling on summary  
6 judgment motions); *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 778–79 (9th Cir. 2002),  
7 *as amended* (holding district court properly refused to consider inadmissible hearsay when  
8 ruling on summary judgment motion).

9 During oral argument, WEED argued that Richardson's statements to Glenn Martin  
10 are admissible under Federal Rule of Evidence 801(d)(1)(A), because the statements are  
11 inconsistent with Richardson's deposition testimony that he made no such statements.  
12 (Doc. 81-5 at 9.) Under Rule 801(d)(1)(A), a prior statement is admissible non-hearsay if,  
13 among other things, the statement "was given under penalty of perjury at a trial, hearing,  
14 or other proceeding or in a deposition." This rule does not allow, as WEED contends, the  
15 admission of an out-of-court statement if the statement conflicts with prior sworn  
16 testimony. The rule requires that the out-of-court statement itself be made under penalty  
17 of perjury. There is no indication that Richardson's statements to Glenn Martin were made  
18 under penalty of perjury.

19 Therefore, Richardson's statements are hearsay, and the entire combined statement  
20 is inadmissible. *Sana v. Hawaiian Cruises, Ltd.*, 181 F.3d 1041, 1045 (9th Cir. 1999)  
21 (stating that layered hearsay is admissible only if "each layer of hearsay . . . satisf[ies] an  
22 exception to the hearsay rule"). WEED does not argue that Richardson's alleged  
23 statements would be admissible at trial in some other form. *See JL Beverage Co. v. Jim*  
24 *Beam Brands Co.*, 828 F.3d 1098, 1110 (9th Cir. 2016) ("[A]t summary judgment a district  
25 court may consider hearsay evidence submitted in an inadmissible form, so long as the  
26 underlying evidence could be provided in an admissible form at trial, such as by live  
27 testimony."). Given that Glenn Martin cannot testify to Richardson's hearsay statements,  
28 and that Richardson denied making such statements, it appears they would not be

1 admissible in any form at trial.

2 Without the inadmissible evidence, WEED's claim that Plaintiff's recommendation  
3 was made with fraudulent intent rests on a single (disputed) fact: Ryan performed no  
4 consulting services after being hired. Plaintiff is correct that, as a matter of law, this fact  
5 alone cannot support a finding that Plaintiff intended to deceive WEED. *McAlister*, 829  
6 P.2d at 1260 (explaining that "an intent not to perform or to deceive must be established  
7 independent of a showing of the defendant's failure to perform" (citation omitted)).  
8 Therefore, Plaintiff has met his initial burden by showing that WEED "does not have  
9 enough evidence of an essential element to carry its ultimate burden of persuasion at trial."  
10 *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). WEED,  
11 in turn, has failed to meet its responsive burden "to produce enough evidence to create a  
12 genuine issue of material fact." *Id.* at 1103. Plaintiff is consequently entitled to summary  
13 judgment. *See id.*

14 **IT IS ORDERED:**


15 1. Defendants' Motion for Partial Summary Judgment (Doc. 56) is **granted in**  
16 **part and denied in part**, and Plaintiff's Cross-Motion for Partial Summary Judgment  
17 (Doc. 75) is **granted in part and denied in part**, as follows:

- 18 a. Summary judgment is **denied** on Plaintiff's claims for breach of contract  
19 (Count One and Count Two of the First Amended Complaint (Doc. 29)).
- 20 b. Summary judgment is **granted** in favor of Defendants on Plaintiff's claim  
21 for fraudulent transfer in violation of Ariz. Rev. Stat. § 44-1004 (Count Six  
22 of the First Amended Complaint (Doc. 29)). Defendants Glenn Martin,  
23 Nicole Breen, Ryan Breen, and GEM Management Group, LLC are  
24 **dismissed** from this action.
- 25 c. Summary judgment is **granted** in favor of Plaintiff on Defendant Weed,  
26 Incorporated's counterclaims for fraudulent misrepresentation and  
27 concealment and breach of contract (Count One and Count Two,  
28 respectively, of the Second Amended Counterclaim (Doc. 50)).

1           2.       The parties shall file a Joint Proposed Pretrial Order within **30 days** of the  
2 date of this Order. (*See* Doc. 27 and form attached thereto.)

3           Dated this 20th day of November, 2019.

4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28



---

Honorable Rosemary Márquez  
United States District Judge